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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DENISE A. NARDI, Plaintiff and Appellant, v. RICHARD A. DESANTIS et al., Defendants and Respondents.	B211513 (Los Angeles County Super. Ct. No. LC075498)

APPEAL from a judgment of the Superior Court of Los Angeles County. James A. Kaddo, Judge. Dismissed.

Kevin M. Kallberg; and Denise A. Nardi for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Kenneth C. Feldman for Defendants and Respondents.

INTRODUCTION

Appellant, Denise A. Nardi (Nardi), appeals from a judgment confirming an arbitration award arising from an action in the Los Angeles County Superior Court entitled "Denise Nardi v. Richard DeSantis, et al." In the superior court action, Nardi sued respondents Richard DeSantis and Steven Holohan (DeSantis) for legal malpractice. DeSantis maintained that the matter was properly one for arbitration based upon a written retainer agreement and moved to compel arbitration. Nardi contended that DeSantis had failed to comply with Business and Professions Code section 6148 thereby rendering the arbitration clause void. The trial court granted DeSantis' motion to compel arbitration and the matter was arbitrated before the American Arbitration Association resulting in an arbitration award which Nardi claims should have been litigated in the Superior Court as a civil action. Following the refusal of the superior court to vacate the award and subsequent to the judgment thereon, Nardi brought this appeal. For the reasons hereafter given, we dismiss the appeal.

FACTUAL AND PROCEDURAL SYNOPSIS

Underlying action of Nardi v. O'Hara & Barnes.

In July of 2001, Nardi started a law firm with one Callie O'Hara. In January of 2002, a friend of O'Hara's, one Brent Barnes, was taken into the firm as an equal partner. Difficulties arose among the partners which led to the ousting of Nardi from the partnership. Nardi maintained that the motive for the ouster was to enable the remaining partners to lay claim to all of the firm revenue as well as the accounts receivable.

Nardi retained DeSantis in early 2003 to prosecute her action against her former partners for unlawfully ousting her. The fee agreement signed by Nardi with DeSantis was based upon an hourly billing arrangement. Nardi's underlying theory was that her former partners should have compensated her based upon the law firm's income before and after her ouster. Nardi maintained that at termination she was entitled to amounts due to her for accounts receivable and amounts derived from future unfinished business.

Trial of the matter occurred in July of 2005. During the in limine phase of the action, and before evidence was taken, O'Hara and Barnes made a motion, which was granted by the trial judge, resulting in monetary and issue sanctions being assessed against Nardi. The sanctions precluded Nardi from claiming any profits beyond the date of her ouster, as a result of Nardi's failure to properly object to discovery undertaken and conducted in December of 2004, and failure to oppose the discovery motion heard in February of 2005.

The jury reached a unanimous verdict in favor of Nardi on her limited fraud claims and Nardi's newly discovered claim for defamation. Prior to the punitive damages phase of the trial the parties settled the matter, whereupon Nardi requested a final bill for fees from DeSantis.

Nardi claims to have requested current fee billings from DeSantis on numerous occasions throughout the litigation. Nardi asserts that it was undisputed that she requested a bill from DeSantis on September 1, 2005. Nardi contends that she got no response from DeSantis pertaining to his fee billings until October 24, 2005. Nardi admits that as of the date of the start of trial she had received a bill dated April 25, 2005, but the bill only included work for the period of April 2004 to December 2004. After the September 1, 2005, request of Nardi, she maintains that no further billing information was received from DeSantis until October 24, 2005.

Nardi states that as of October 25, 2005, she had already paid DeSantis a sum exceeding $164,000, in addition to $40,000 for expenses of experts. In the October 25, 2005, billing by DeSantis, $250,000 was claimed to be due and owing for the nine month period from January 1, 2005, to October 21, 2005. Nardi claims this bill contained many mistakes which led to an immediate discussion about the mistakes in the invoicing and purported malpractice issues. Nardi claims DeSantis refused to compromise or to further discuss either issue with her.

In early December of 2005 Nardi terminated DeSantis for having withdrawn, purportedly without authority, the sum of $104,468 from the settlement proceeds held in

his client's trust account and utilized the funds for his own benefit. Nardi then commenced her legal malpractice action against DeSantis.

Action by Nardi for legal malpractice and fees.

On August 15, 2006, Nardi filed her complaint for legal malpractice and other causes of action against DeSantis. DeSantis responded by filing a petition to have the matter submitted to compulsory arbitration pursuant to the provisions of the retainer agreement between Nardi and DeSantis.

Nardi opposed the petition to arbitrate on many grounds, but primarily on the provision set forth in Business and Professions Code section 6148, subdivision (c) which provides: "Failure to comply with any provision of this section renders the agreement voidable at the option of the client, . . ." In reply, DeSantis filed his opposition which included a one page declaration in which he declared under penalty of perjury that "Nardi never requested a billing from me."

At the hearing on February 2, 2007, the court's tentative decision was to deny the petition to compel arbitration for failure of DeSantis to comply with Business and Professions Code section 6148. The court noted that "Plaintiff has alleged at paragraph 14 of the complaint facts which would make the retainer agreement voidable by the client pursuant to Business and Professions Code section 6148(b)." DeSantis argued that Nardi's complaint was not verified and her opposition was not under oath, and as a result the only evidence before the court was that contained in the declaration of DeSantis swearing that Nardi never requested a bill from him. The court continued the matter to February 21, 2007, in order to give Nardi an opportunity to submit a declaration pertaining to DeSantis's failure to comply with Business and Professions Code section 6148.

On February 5, 2007, DeSantis filed an additional declaration consisting of six pages giving additional facts pertaining to his handling of Nardi's case prior to his termination. Nardi maintained that this additional declaration consisted of self serving, inaccurate and misleading information for many reasons and brought to the court's

attention the deficiencies in DeSantis's supplemental declaration. Nardi focused her criticism of DeSantis's declaration on the fact that DeSantis repeatedly declared that Nardi never requested a billing or anything like it and that he was the victim of Nardi's ill gotten benefits of his efforts without paying her bills.

At the hearing on February 21, 2007, the court granted DeSantis's motion to compel arbitration, finding, among other things, that "[t]he facts contained in the declaration of Denise A. Nardi are outweighed by the facts presented in the declaration of Richard A. DeSantis and the attachment thereto, and the court finds those to be more credible." "[T]he court finds his declaration to be more credible, and therefore, he has complied with B & P, and therefore, the arbitration provision of the agreement is operable." In a further statement to the court, DeSantis continued to assert that "[S]he never asked, and the reason she never asked, I presume, is because she was so far behind in her bill, so my declaration says she never asked." The court concluded with the observation that "[T]he court finds that to be more credible."

The record reveals that the following colloquy took place at the time of the hearing on the matter:

"Ms. Nardi: The other thing is, at the end of the case, at the time of settlement, I need to pay his bill. I wanted him out of my case, and I still couldn't get a bill from him. [¶] And he did not address that in his declaration. On the September 1 when we settled, and I – I believe Mr. Holohan heard that as well – we were in the car leaving the settlement. I said, 'I need your bill. I want to settle this account with you even before I get my settlement.' [¶] I told him that. 'I want to settle this account with you. I don't care if I have my settlement or not. I will find the money to try and pay you, but I want to see what my bill is.' I didn't get a bill for six weeks.

"Mr. DeSantis: I'll respond to that, Your Honor.

"The Court: All right.

"Mr. DeSantis: That conversation did not take place, and the reason it didn't take place is because Ms. Nardi wanted us to continue to seek the collection on the settlement which had been reached after the verdict. And in fact, she fired us on the 23rd, I think, of

November, and rehired us on the 25th. [¶] And she wanted us to continue to pursue the defendants, and we were pursuing the defendants until December the 3rd, and therefore, there was no reason to give her a bill. . . . [W]e would have had to continue giving her more bills, but we didn't. She didn't ask for the bill.

"The Court: And that's what's required by the Business and Professions Code.

"Mr. DeSantis: Right."

The court signed an order that the matter be arbitrated pursuant to the terms of the written retainer agreement. The court's ruling was apparently based on DeSantis's two declarations and arguments of the parties at the time of the hearing on the motion. The parties were thus required under the court's ruling to equally fund a three panel arbitration under the rules of the American Arbitration Association.

Arbitration hearing, award and denial of petition to vacate award.

The matter then proceeded to arbitration. Both parties were represented by counsel. DeSantis was deposed by Nardi on February 25, 2008. DeSantis testified as follows:

"Q: Aside from her not wanting to receive a bill, did she ever ask you, 'approximately how much money do I owe you now?

"A: I don't recall that.

"Q: Was she ever curious? Did it ever appear to you that she wanted to know how much money approximately she owed the firm?

"A: I think the only time she ever really wanted a bill was some time after the actual stipulation for settlement was made.

"Q: After the $900,000 settlement?

"A: Right.

"Q: Okay. And that was in-

"A: September 1st.

"Q: -September, 05?

"A: Right.

"Q: Okay. That's the first you recall ever being requested for a bill?

"A: She wanted to get the bill at that point, and she wanted to know because of tax reasons."

The arbitration was conducted in March of 2008. The award was made on May 28, 2008. The panel found that although DeSantis's conduct fell below the standard of care in many respect, Nardi had failed to prove that DeSantis's conduct had caused Nardi any damage, and therefore found no legal malpractice. DeSantis's fees were found to be excessive, duplicative, erroneous and unauthorized thereby leading to a reduction in his fees. The panel further found that DeSantis's billing practices violated Business and Professions Code section 6148. The panel specifically found that the retainer agreement was voidable under Business and Professions Code section 6148, subdivision (c) thereby relegating DeSantis to a reasonable fee.

The award, however, did not address the question of loss of arbitration jurisdiction by reason of the finding that DeSantis had violated Business and Professions Code section 6148 which voided the retainer agreement. The arbitrators' only patent concern was to insure that DeSantis was entitled to collect only a reasonable fee. The costs of the arbitration paid by Nardi totaled $82,915.86. The three arbitrators were paid over $147,031 for the one week arbitration hearing.

Nardi filed a petition to vacate the arbitration award on grounds DeSantis committed fraud by lying to the trial court and utilizing undue means to compel Nardi to participate in and fund an unwarranted arbitration Nardi's petition to vacate the arbitration award apprised the trial court that because the arbitration provision in the retainer agreement was in fact void, the arbitrators exceeded their power in hearing the matter at all.

At the hearing on Nardi's motion to vacate the arbitration award on August 22, 2008, the court ratified the determinations made by the arbitrators. In so ruling, the trial court adopted the reasoning of the arbitrators that the violation of section 6148 of the Business and Professions Code was inconsequential and the court expressed the view that it was not inclined to second guess the decision of the arbitrators. The court opined that

Nardi should file a new complaint or appeal in order to obtain a remedy for her purported damages.

The court's minute order indicates the arbitrators fully addressed all issues raised in the petition to vacate; that a purported violation of Business and Professions Code section 6148 was addressed by the arbitrators; and therefore cannot constitute evidence that the arbitrators exceeded their authority

Judgment was subsequently entered and Nardi timely filed her appeal.

DISCUSSION

Effect of Nardi's accepting benefits of the judgment on her right to appeal.

DeSantis maintains that Nardi has waived her right to appeal by accepting the benefits of the judgment entered by the trial court. Specifically, DeSantis urges that by Nardi's acceptance of a distribution from his client's trust account in the sum of $94,347.91 as ordered by the arbitrators Nardi has waived her right to appeal.

In that regard, DeSantis filed a motion to dismiss appeal with exhibits on December 30, 2008. On January 7, 2009, this court ruled that the dismissal motion would be decided in connection with the briefing on the merits. DeSantis summarizes his arguments as follows: After the arbitrators rendered their award, and in accordance with the arbitration award, Nardi accepted a distribution from DeSantis' trust account in the sum of $94,347.91. At the same time, Nardi allowed DeSantis to withdraw $161,214.50 as payment of his attorney's fees. Thus, contends DeSantis, Nardi has waived her right to appeal.

The Judgment Confirming Arbitration Award filed on August 25, 2008, states:

"IT IS ADJUDGED that the award of the Arbitrators awarding to petitioners Richard A. DeSantis, the Law Offices of Richard A. DeSantis, and Stephen W. Holohan the recovery from respondent Denise A. Nardi the sum of $161,214.50, together with interest in the amount of $44.17 per day from May 28, 2008 until the award is paid in full shall be the judgment of this Court. Prevailing party is responsible to file an Notice of Entry of Judgment."

On June 12, 2008, Nardi advised the trial court at a post-arbitration status conference that she intended to file a petition to vacate the arbitration award. After that hearing, DeSantis sent a letter to Nardi which stated:

"Your statement this morning to the Court on the record that you intend to file a Petition to Vacate the award of the arbitration panel puts the **entire sums held in trust in dispute,** in our opinion.

"Therefore, this letter is to advise you that no sums will be disbursed and the interest stated by the arbitrators on sums awarded to this office, will be added on a daily basis." (Emphasis in original.)

Later that same day on June 12, 2008, Nardi sent a letter to DeSantis which stated:

"I agree you can take $161,214.50. Mr. Feldman says you do want it (see his June 5 letter). You said you are seeking to confirm the award which awards you that amount. There is no 'dispute' on this.

"***

"I again ask you again to do something sensible before this gets out of control again. Please pay yourself $161,515 from my trust account."

One June 27, 2008, DeSantis sent another letter to Nardi stating that he could not disburse funds to her under the Arbitration Award without a waiver of Rule 4-100(A)(2) of the California Rules of Professional Conduct. Rule 4-100(A)(2) provides that where a lawyer claims a portion of trust account funds for unpaid fees, and the client disputes the fee claim, the disputed amount must be retained in the trust account until the matter is resolved. Absent client consent, Rule 4-100(A)(2) states that "the disputed portion shall not be withdrawn until the dispute is finally resolved." The Rule requires attorneys to withdraw fees at the earliest reasonable time after their interest therein becomes "fixed."

On June 30, 2008, Nardi agreed to waive the requirements of Rule 4-100(A)(2) in writing by fax stating on a copy of the June 27, 2008, letter that: "I, Denise A. Nardi agree to waive the provisions of CRPC Rule 4-100(A)(2) for the purposes of distribution of the funds in the trust account in the amount of $161,214.50." Nardi struck the words

"in accordance with the May 28, 2008 Arbitration Award," thereby apparently, as contended by DeSantis, to place the interest amount before the court.

On July 3, 2008, DeSantis withdrew $161,214.50 from the trust account, but not the interest portion of the award. At the same time, Nardi was issued a check for $96,347.91, which Nardi endorsed and cashed.

DeSantis is correct that a party waives the right to appeal by voluntarily accepting the benefits of the judgment. As contended by DeSantis, the right to accept the benefits of the judgment and the right to appeal are inconsistent, so that an election of the former is deemed a renunciation of the latter. (*Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 824; *Louise Gardens of Encino Homeowners' Assn. Inc v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 661.) The California Supreme Court explained the rule as follows in *Lee v. Brown* (1976) 18 Cal.3d 110, 114 as follows: "First, as a general proposition, one who accepts the benefits of a judgment cannot thereafter attack the judgment by appeal. In *Estate of Shaver* (1900) 131 Cal. 219, we expressed the rule as follows: 'The right to accept the fruits of a judgment, and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is, therefor, a renunciation of the other.'" Case law applies this rule to arbitration awards. (See *Louise Gardens, supra,* 82 Cal.App.4th at p. 661 and *Trollope v. Jefferies, supra,* 55 Cal.App.3d at p. 824.)

We hold that Nardi has waived her right to appeal by accepting the benefits of the arbitration award.

DISPOSITION

The appeal is dismissed. Each party will bear its own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.